Dismissed Miller J

Filed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 571.

JACOB H. V. COCKCROFT AND ARTHUR LEARY, PLAINTIFFS IN ERROR,

vs.

WALTER S. VOSE AND JAMES F. JOYCE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED DECEMBER 28, 1871.

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1 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol in the city of Albany, on the 19th day of May, in the year of our Lord one thousand eight hundred and seventy-one before the judges of said court.

Witness the Hon. Sanford E. Church, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur.—June 1, 1871.

2 WALTER S. VOSE & ANOTHER, RESPONDENTS,
against
JACOB H. V. COCKROFT & ANO'R, APPELLANTS.

Be it remembered that, on the 9th day of July, in the year of our Lord one thousand eight hundred and sixty-six, Jacob H. V. Cockroft & ano'r, the appellants in this action, came here into the court of appeals, by Charles N. Black, their attorney, and filed in the said court a notice of appeal and return thereto from a judgment of the supreme court first judicial district of the State of New York; and Walter S. Vose & another, the respondents in said action, afterwards appeared in said court of appeals, by Benedict, Burr and Benedict, their attorneys, which said notice of appeal, and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard the said cause argued by Mr. Charles N. Black, of counsel for the appellants,
3 and Mr. Benedict, of counsel for the respondent; and, after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondents recover against the appellants their costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength, & effect.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof,
4 according to the form in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

[SEAL.] COR'S TEN BERICH,
Deputy Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 1st, 1871.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] COR'S TEN BERICH,
Deputy Clerk.

5 *Summons (for a money demand on contract.)*

Supreme court, city and county of New York.

WALTER S. VOSE AND JAMES F. JOYCE
against
JACOB H. V. COCKCROFT AND ARTHUR LEARY.

To the defendants:

SIR: You are hereby summoned to answer the complaint in this action, of which a copy is herewith served upon you, and serve a copy of your answer on us at our office, No. 74 Wall street, New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid, the plaintiffs will take judgment against you for the sum of two hundred and thirty-four dollars and fifty-six cents, with interest from the ninth day of March, one thousand eight hundred and fifty-nine, besides the costs this action.

Dated New York, July 6th, 1859.

BENEDICT, BURR & BENEDICT,
Pl'ff's Att'ys, 74 Wall Street, New York.

6 Supreme court, city and county of New York.

WALTER S. VOSE AND JAMES F. JOYCE
against
JACOB H. V. COCKCROFT AND ARTHUR LEARY.

The plaintiffs, by Benedict, Burr & Benedict, their attorneys, complain of the defendants, and allege—

That the plaintiffs, at all the times hereinafter named, were partners in trade, doing business under the firm-name of Vose & Joyce.

That, previously to the 1st day of July, 1859, Lorenzo W. Lovejoy, then master of the brig Jachin, had contracted within this State a debt amounting to over fifty dollars, for and on account of work and services done, and materials, supplies, and articles furnished within this State, for or towards the fitting, furnishing, equipping, sailing, and running said brig, which was fit and proper for the use of said vessel at the time they were furnished, to wit, the 9th of March, 1859, all of which were of the fair value of two hundred and thirty-four dollars and fifty-six cents, and that there was due to the plaintiff upon said account, on the first day of July, 1859, the sum of two hundred and thirty-four dollars and fifty-six cents, over and above all payments and discounts. That, on the 1st day of July, 1859, said plaintiffs caused to be drawn up specifications of their lien, the correctness of which was sworn to by James F. Joyce, one of the plaintiffs, which specifications were duly filed in the office of the clerk of the county of New York, that being the county wherein such debt was contracted, and that said claim was a subsisting lien upon said vessel on the said first of July.

That said vessel departed from the port of New York on the sixteenth day of March, 1859, and did not return till the day of June,
7 1859. That, thereafter, and on said 1st day of July, 1859, the said plaintiffs, duly and pursuant to the provisions of article 8th, chapter 8th, part 3d, of the Revised Statutes, made application in writing to the Hon. J. J. Roosevelt, a justice of the supreme court of the State of New York, for a warrant to enforce the lien of such debt, and to collect the amount thereof as required by the said provisions.

And that said application specified by whom such debt was contracted, and for what ship or vessel and the items composing such debt, and was verified by the affidavit of said Joyce, stating that the sum claimed in said account was justly due to the plaintiff over and above all payments and discounts, and also an affidavit of James H. Owens, a disinterested witness, verifiying the facts and circumstances to establish such demand.

That, thereupon, said justice duly issued his warrant to the sheriff of the city and county of New York, commanding him to attach, seize, and safely keep such brig, her tackle, apparel, and furniture, to answer all such liens as should be established against her according to law, and to make return of his proceedings under such warrant to him within ten days after such seizure.

That, thereupon, the said sheriff did forthwith execute the same, and seized said brig as directed by statute.

That, thereupon, the defendant Cockcroft, the owner of said vessel, did, on the 2d day of July, 1859, and before any order of sale of said brig was made, apply to the Hon. J. J. Roosevelt for an order to discharge the same, and did, thereupon, in conjunction with the defendant Leary, duly execute and deliver to said Roosevelt a bond to these plaintiffs, of which a copy is hereto annexed, marked Schedule A, whereby they bound themselves, jointly and severally, in the sum of one thousand dollars, subject to the consideration expressed in said bond; and thereupon, said warrant was discharged.

And the plaintiffs, according to the provisions of said act in such case made and provided, allege that the condition of said bond has been broken by the said defendants, and assign as a breach of the condition of said bond, that the aforesaid claim, of two hundred and thirty-four dollars and fifty-six cents, has not been paid, nor any part thereof,
8 whereby the defendants are indebted to the plaintiff in said sum of two hundred and thirty-four dollars and fifty-six cents, and interest from March 9, 1859, for which sum, with the costs and expenses of said attachment, and of this action, they demand judgment against the defendants.

BENEDICT, BURR & BENEDICT,
Pl'ffs' Att'ys.

CITY AND COUNTY OF NEW YORK, *ss:*

James F. Joyce, one of said plaintiffs, being duly sworn, says that the foregoing action is true of his own knowledge, except as to the matters therein stated on the information and belief of the plaintiffs, and as to those matters he believes it to be true.

JA'S F. JOYCE.

Sworn before me this 6th day of July, 1859.

W'M D. JONES,
Notary Public.

Know all men by these presents, that we, Jacob, H. V. Cockcroft, broker, of the city of Brooklyn, and Arthur Leary, of the city and county of New York, merchant, are held and firmly bound unto James F. Joyce, and Walter S. Vose, composing the firm of Vose & Joyce, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said James F. Joyce and Walter S. Vose, their executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and ad-

ministrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the second day of July, one thousand eight hundred and fifty-nine.

Whereas the brig Jachin has been attached at the suit of the above-named James F. Joyce and Walter S. Vose, claiming a lien thereon under title viii, art. 1, chap. viii, part iii, of the Revised Statutes, and the said Jacob H. V. Cockcroft, owner of said vessel, has applied to the office issuing the warrant of attachment for the discharge thereof:

Now, therefore, in consideration of the premises, and of one
9 dollar to each of us in hand paid, we undertake to covenant and agree that we will pay the amount of all such claims and demands as shall have been exhibited, which shall be established to have been subsisting liens upon such vessel, pursuant to the provisions of the title of the Revised Statutes above quoted, at the time of exhibiting the same respectively; and this bond is upon the express condition that the obligors will pay the amount of all such claims and demands as shall have been exhibited, which shall be established to have been subsisting liens upon such vessel, pursuant to the provisions of the title above mentioned at the time of exhibiting the same respectively.

J. H. V. COCKCROFT. [L. S.]
ARTHUR LEARY. [L. S.]

Signed, sealed, and delivered in presence of—(the words "one thousand" having been interlined)— JOHN BERRY.

Supreme court.

WALTER L. VOSE AND JAMES F. JOYCE
against
JACOB H. V. COCKCROFT AND ARTHUR LEARY.

And the defendants, for answer to the complaint in this action, by Charles N. Black, their attorney, says:

First. That they deny that all of said materials, supplies, and articles in said complaint referred to were fit and proper for the use of said vessel, at the time they were furnished, and they have not sufficient knowledge or information to form a belief, as to the drawing up or filing the specifications referred to in said complaint, and they deny
10 that said claim was a subsisting lien upon said vessel, and these defendants have not sufficient knowledge or information to form a belief, as to whether the application made to said Justice Roosevelt specified by whom such debt was contracted, and for what ship or vessel, or the items comprising said alleged debt, or that the same was unpaid, or that the same was justly due over and above all payments, discounts, or that the same was accompanied with the affidavit of one Owens, a disinterested witness, verifying the alleged facts and circumstances to establish such demand, or that thereupon said justice issued his warrant to the sheriff of the city and county of New York, commanding him to attach, seize, and safely keep said vessel, or that thereupon said sheriff did forthwith execute the same, and seize said vessel as directed by statute, but these defendants admit that said sheriff pretended to have attached said vessel, whereupon said Cockcroft did apply to said justice, as alleged in said complaint, to have said pretended attachment discharged.

These defendants further deny upon their information and belief that

hundred and thirty-four dollars and fifty-six cents has been exhibited and established to have been subsisting liens upon said vessel.

Second. These defendants, as a separate and distinct defence, allege, upon their information and belief, that said alleged work and services were not done, nor were said materials, supplies, and articles furnished by the said plaintiff upon the credit of said vessel, or her owner, but the same was done and furnished upon the order, and at the request of, Lorenzo P. Lovejoy, and upon his sole and individual credit and responsibility; that the defendant Cockcroft was not in possession of said vessel at the time said alleged supplies, &c., were furnished, but said vessel was under the management and control, and at the expense of said Lovejoy, which was well known to the said plaintiffs, and said claim is not a lien upon said vessel.

Wherefore, these defendants demand that said complaint be dismissed with costs.

CHA'S N. BLACK,
Att'y for Def'ts.

11 CITY AND COUNTY OF NEW YORK, *ss:*

Jacob H. V. Cockcroft and Arthur Leary, being duly sworn, each for himself, says that he has read the foregoing complaint, and the same is true of his own knowledge, except as to those matters stated to be on his information and belief, and as to those matters he believes it to be true.

ARTHUR LEARY.
J. H. V. COCKCROFT.

Sworn before me this 15th day of August, 1859.
R. K. VAL, *Public Notary.*

Supereme court.

WALTER S. VOSE AND JAMES F. JOYCE
against
JACOB H. V. COCKCROFT AND ARTHUR LEARY.

This cause came on for trial on the 5th day of November, 1863, before the Hon. W'm F. Allen, justice, without a jury.

Robert D. Benedict appeared as counsel for plaintiffs, and Cha's N. Black as counsel for defendants.

Plaintiff's counsel read in evidence the bond set forth in the complaint.

(See complaint.)

12 Supreme court.

WALTER S. VOSE AND JAMES F. JOYCE
against
JACOB H. V. COCKCROFT AND ARTHUR LEARY.

It is admitted that, on the 9th of March, 1859, the plaintiffs delivered on the brig Jachin the articles stated in the specifications referred to in the complaint in this action, and that their value was over $50.

It is also admitted that the specifications were duly sworn to and filed on the 24th day of March, 1859, according to the statute in such

case made, and that the county of New York was the proper county to file the same, if it was proper to file them at all.

That said vessel departed from the port of New York, March 16th, 1859, and did not return until June . 1859.

That, on the first day of July, 1859, said plaintiffs made application to his honor Justice Roosevelt, for a warrant to enforce their alleged lien in pursuance of the Revised Statutes, article 8th, chapter 8th, part 3d, as set forth in said complaint.

That said warrant was issued, and the sheriff seized the vessel as therein stated, and that the defendants gave a bond pursuant to said statute, a copy of which is annexed to the complaint.

The defendants admit that the forms of the statute in the above respects were complied with, but they do not admit that the plaintiff had a subsisting lien upon said vessel, or that they furnished any articles for said vessel, by which, on taking said proceedings or otherwise, they had a lien on said vessel or the right to enforce said proceedings, nor do they admit that the articles enumerated in said specifications were such as the statute in such cases contemplates or refers to.

CHA'S N. BLACK,
Att'y for Def'ts.

13 LORENZO W. LOVEJOY, a witness for the plaintiffs, duly sworn and examined pursuant to the consent of attorneys for respective parties, deposes and says: I am a mariner; I have followed the water about twenty years; I am master of the Mary P. Burton now; I expect to go away in her in a day or two; I know the brig Jachin; I was master of her in the year 1859; I ceased to be master of her shortly before she sailed on a voyage to Trinidad; I knew the firm of Vose & Joyce, of this city; they were grocers; I got some goods of them for that vessel shortly before she sailed. (Shown bill.) I should say this bill states the articles that I got of them for her correctly, as nigh as I can recollect; there were none of those articles that did not go aboard the vessel that I know of; they were necessary for the vessel for that voyage; I ordered them, I suppose, eight or ten days before I left the vessel; they were put aboard some two or three or four days before I left the vessel; they were not paid for, without some one else paid for them; I did not.

Cross-examined:

I have a suit against Mr. Cockcroft.

Q. Have you not claimed payment from Cockcroft, of this bill of stores, as due to you?

(Plaintiff objects.)

A. I have not that I know of; I have known Vose & Joyce about six or seven years; I had made several voyages in the Jachin before this bill was bought, as captain; can't tell how many.

Q. Who had purchased the stores for her on these previous voyages?

(Objected to.)

A. I had; I had bought them of Vose & Joyce.

Q. Who paid for them?

(Objected to.)

A. I had.

Q. Did you buy them for cash or on credit?

(Objected to.)

14 A. I always paid them in cash, but sometimes they used to wait till the vessel came back after making the voyage; I had

been trading with them three or four years; I never bought stores for the Jachin from anybody else in New York; I cannot state any particular voyage when I paid cash down for the stores; that is not usual; I don't think I ever did pay cash on delivery while I was in her, but I have in other vessels; if I had gone on this voyage in the Jachin I should have paid for the stores on her return; that is the only reason I did not pay for them; I sailed the Jachin on shares, under a written agreement; I never spoke to plaintiffs about that agreement before I bought these stores that I recollect of; I got acquainted with Vose down East; he and I came from the same section; I saw these goods on board the Jachin; the goods were mainly put aboard before we finished loading the Jachin; I did not leave till after she was loaded; I got a bill of the stores; I guess it is at home; I don't recollect exactly about it; I commenced a suit against Cockcroft before the vessel sailed. I don't recollect making affidavit that these stores were mine; I understood from the plaintiffs that I was liable for these stores.

Redirect:

These previous bills of stores which I had bought of the plaintiffs, I paid for out of the earnings of the vessel; I did not get any of the earnings on this voyage.

Recross examination:

Q. Did you not pay for the previous bills of stores with your own money?

(Objected to.)

A. One-half of the earnings of the vessel was my own money; I did pay for them with my own money.

Q. Did you not pay for them without regard to the earnings of the vessel?

(Objected to.)

A. I should have had to pay for them whether the vessel earned money or not.

15 Redirect:

Q. Did you leave the vessel of your own accord?

(Defendant objects.)

A. I did not.

Q. How came you to leave?

(Defendant objects.)

A. They took the vessel and run away from me.

Q. Who did?

(Defendant objects.)

A. Mr. Cockcroft, I suppose.

(Objected.)

He put in another master, and it was about that that I had the suit with him.

L. W'M LOVEJOY.

Sworn to before me this 18th May, 1863.

W'M L. JONES,
Notary Public, 74 Wall Street.

[Stamp.]

NEW YORK, *May* 9, 1859.

Brig Jachin and owners bought of Vose & Joyce, dealers in teas, coffees, and general groceries, 81 *Catharine street.*

To 4	barrels mess beef, *a* $12 00	$48 00
2	" mess pork, *a* 19 00	38 00
3	" flour, Greeland, *a* 7 25	21 75
3	" 6s., pilot bread, 210, 5 00	11 25
1	bushel white beans	1 75
1	bbl. 2s., mack'rel	17 00
1	keg tongue and rounds	1 50
1	" pickles "5 gallons"	2 50
1	" tripe	3 00
½	box raisins	1 50
25	lbs. dried apples, *a* 12c	3 00
	20 " whole coffee, *a* 16	3 20
16	30 lbs. best butter, *a* 24	7 20
	30 " lard, *a* 14	4 20
50	lbs. rice, *a* 4½	2 25
1	quintal codfish, *a* $5	5 00
5	gallons fluid, *a* 65c	3 25
5	" whale oil, *a* $1	5 00
10	" saleratus, *a* 10c	1 00
½	lbs. ground pepper, *a* 20c	10
2	" " ginger, *a* 12	24
1	box cheese, 36.5.31. *a* 12	3 72
50	lbs. brown sugar, *a* 9	4 50
4	bars soap, *a* 20	80
1	bbl. molasses, 441½ 42½, *a* 45c	19 13
4	gallons vinegar, *a* 18c	72
4	bbls. potatoes, *a* 22s	11 00
1	bbl. 2s., turnips, $4 75	5 00
1	" 2s., onions, 1 75	2 00
2	dozen cabbages, *a* 1 00	2 00
2	cans, *a* 6s	1 50
1	bag, 2s., 1 bbl. 2s	50
1	box Cornish's tobacco	3 00
		$234 56

JAMES F. JOYCE, sworn for plaintiffs:

Q. You are one of the plaintiffs?

A. Yes, sir.

Q. Do you recollect Capt. Lovejoy and the brig Jachin, and the furnishing of these supplies?

A. Yes, sir.

Q. Who ordered the supplies?

A. Capt. Lovejoy.

Q. Have you calculated the interest upon the bill?

A. Yes, sir; the interest is $76 35; the bill is $234 56; the total amount is $310 91.

Q. Have you ever been paid any portion of that bill?

A. No, sir.

Cross-examined:

Q. Did you ever own this brig?

17 A. Yes, sir.
Q. And sold her to Cockcroft?
A. Yes, sir—the firm of Vose & Joyce.
Q. Was Lovejoy master of her at that time, when you owned her?
A. Yes, sir.
Q. And sailed her on shares?
A. Yes, sir.
Q. And bought his stores of you while he sailed her on shares?
A. I believe he did, but I could not say positively that he always did.
Q. Do you recollect asking Cockcroft to employ Lovejoy to sail the vessel for him?
A. I do not recollect.
Q. Do you not recollect speaking to him about it, and showing the agreement under which Lovejoy sailed the vessel for you?
A. No, sir.
Q. You had a written agreement with him?
A. I do not recollect that we ever had; we may have had, but I have no such recollection.
Q. You do not recollect talking to Mr. Cockcroft about Lovejoy?
A. I believe Mr. Cockcroft made some inquiries about Mr. Lovejoy—about his character as shipmaster, &c.
Q. Lovejoy, you know, did go on and sail this vessel for Cockcroft?
A. Yes, sir; some year or two, I should think.
Q. And he got his supplies all along from you?
A. Yes, sir; several bills of supplies before this particular vessel, and he paid me for them.

Redirect:

Q. What is your business?
A. I am a grocer and provision dealer.
Q. And have been in the habit of furnishing vessels?
A. For the last twelve or fifteen years.
Q. Do you know what kind of supplies vessels buy in the market?
18 A. I ought to know by this time.
Q. Were these supplies such as are ordinarily furnished?
A. Such as we supply vessels.
Q. I will ask you whether they were fit and proper for the vessel?
(Defendant's counsel objects, on the ground that the witness would have to know upon what voyage this vessel was going.)
Q. Do you know where the vessel was bound to?
A. I don't recollect now; I knew at the time; they were fit and proper.

J. H. V. COCKCROFT, called by defendant's counsel, and sworn:
Q. You are the defendant?
A. Yes, sir.
Q. And was the owner of this brig?
A. Yes, sir.
Q. And you bought her of Vose & Joyce?
A. Yes, sir.
Q. Do you recollect having a conversation with them about Lovejoy?
A. Yes, sir.
Q. What did they say?

(Objected to by plaintiff. Objection overruled, and exception taken by plaintiff.)

A. Before the vessel came in, Mr. Vose came to me a half dozen times to recommend this captain, and wanted me to employ him; I did employ him upon his recommendation.

Q. Did he say anything to you how he had employed him?

A. Yes, sir; he told me he was sailing the vessel then upon shares; the contract of sale was half the earnings of the vessel; she was going on a voyage with Lovejoy at that time; they recommended Lovejoy to me, and told me the terms upon which the vessel was running.

Q. Did you have an agreement with Lovejoy?

A. Yes, sir.

Q. Which you made when he came home?

19 A. Yes, sir.

Q. Is this the paper? (showing witness paper.)

A. Yes, sir.

Q. That is Lovejoy's signature, and this is yours?

Paper then put in evidence, under exception from the plaintiff.

NEW YORK, *May* 24, 1858.

It is this day mutually agreed between J. H. V. Cockcroft, owner of the brig Jachin, and Lorenzo W. Lovejoy, that the latter shall take charge of the said brig Jachin, and sail her on shares, as customary in such cases; that is, the master shall pay all bills for wages of officers and crew, and furnish provisions therefor; also, one-half of all bills for extra labor, stevedores, towage, wharfage, dunnage, commissions, chronometer hire, and other port charges; he shall conduct the business of the vessel in a proper manner; and in consideration of these services, and as wages for himself, shall receive one-half of the gross amount of freight earned by said brig Jachin during the period that he remains master of the vessel aforesaid.

J. H. V. COCKCROFT.
L. W. LOVEJOY.

Q. During the time Lovejoy was in your employ, he sailed under this agreement, and under no other?

A. Yes, sir.

Q. You had nothing to do with the ordering of this store-bill?

A. No, sir—knew nothing about it.

Q. Whether the stores were put on board or not?

A. When they were put on board, I had nothing to do with them.

Q. Did they exhibit an agreement to you similar to that?

A. Yes, sir.

Q. As the agreement they had with Lovejoy?

A. Yes, sir.

Q. How about such an article as a box of tobacco, $3—was that a fit and proper supply for the vessel?

20 A. No; such an article is not furnished to her.

Q. When these goods were furnished had you any voyage agreed upon with Lovejoy, upon which to sail the vessel?

A. I do not know when he furnished them; they were put on board without my knowledge.

Q. Take the date of May 9th, 1859.

A. I cannot tell you without referring to my books; she was partly loaded when I discharged him.

By plaintiff's counsel:

Q. You did not change the voyage after that?
A. No, sir.

Defendants' counsel moves to dismiss the complaint, upon the following ground:

That plaintiffs had not proved any subsisting lien against this vessel at all, and that the work and services were done and the articles furnished by the plaintiffs, upon the credit of the vessel or her owners.

Also, that these articles have not been proved as fit and proper for the use of the vessel when they were furnished.

Motion denied, and exception taken by defendant.

The court then directed a judgment for plaintiffs of $306 91.

21 Supreme court.

WALTER S. VOSE ET AL.
vs.
JACOB H. V. COCKCROFT AND ARTHUR LEARY.

This case coming on to be tried before me, on the 5th day of November, 1863, without a jury, I find, as matter of fact, that, in the month of March, 1859, Lorenzo W. Lovejoy was master of the brig Jachin, owned by the defendant Cockcroft.

That said Lovejoy, as such master, on March 9th, 1859, contracted a debt of the plaintiffs on account of materials and supplies, and articles furnished for or towards the fitting, furnishing, and equipping the brig Jachin, and for provisions and stores fit and proper for the use of the brig Jachin, and which were of the value of two hundred and thirty-one dollars and fifty-six cents.

That the plaintiffs duly filed specifications, as required by the statute, giving liens on domestic vessels, and duly applied for a warrant to enforce the lien, and the vessel was duly arrested under said warrant, and the defendants gave the bond set up in the pleadings to release her from the same.

I further find, as a matter of fact, that, at the time said provisions and stores were furnished as aforesaid, said Lovejoy was sailing said vessel under a written agreement with her owner, the defendant Jacob H. V. Cockcroft, of which the following is a copy:

NEW YORK, *May* 54, 1858.

It was this day mutually agreed between J. H. V. Cockcroft, owner of the brig Jachin, and Lorenzo W. Lovejoy, that the latter shall take charge of the said brig Jachin, and sail her in shares, as is customary in such cases, that is, the master shall pay all bills for wages of officers and crew, and furnish provisions therefor, also one-half of all bills
22 for extra labor, stevedores, towage, wharfage, dunnage, commissions, chronometer hire, and other port charges; he shall conduct the business of the vessel in a proper manner, and in consideration of these services, and as wages for himself, shall receive one-half of the gross amount of freight earned by said brig Jachin during the period that he remains master of the vessel aforesaid.

J. H. V. COCKCROFT.
L. W. LOVEJOY.

That said Lovejoy remained in charge of said brig as master, under

said agreement, until the provisions and supplies furnished by the plaintiff, and claimed in this action, were furnished for said brig, and were put on board, when the said Cockcroft assumed the control of the said brig, and discharged said master, and the said supplies, &c., were afterwards used in and upon and for the benefit of said vessel.

The plaintiff had previously owned this vessel, and had sold her to Crockcroft, and the said Lovejoy had sailed the vessel for the plaintiffs under an agreement similar to that with Cockroft. Lovejoy had bought his stores of the plaintiffs for this vessel for several voyages before, for which he had paid them out of his share of the earnings of the vessel when the vessel returned from the voyage for which the stores were furnished.

Lovejoy ordered this bill of stores from the plaintiffs, and understood from the plaintiffs that he was liable for them.

That none of said debt has ever been paid to the plaintiffs.

And I find, as matter of law, that the said debt was a subsisting lien upon said vessel, and was duly exhibited, and that by reason of the non-payment thereof the condition of the bond has been broken.

That the plaintiffs are entitled to recover of the defendants the amount of said debt and interest, amounting in all to the sum three hundred and six dollars and ninety-one cents, with costs.

W. F. ALLEN.

23 Supreme court.

WALTER S. VOSE AND JAMES F. JOYCE
ag'st
JACOB H. V. COCKCROFT AND ARTHUR LEARY.

GENTS: Please take notice that the defendants make the following exceptions to the findings of his honor Justice Allen, on the trial of this cause, as matters of law, and to his rulings:

1st. The defendants except to his said findings that the said debt therein referred to was a subsisting lien upon the brig Jachin, (said vessel therein referred to,) and that the same was duly exhibited, and that, by reason of the non-payment thereof, the condition of the bond upon which this suit was brought has been broken.

2d. The defendants except to his said findings, that the plaintiffs are entitled to recover of the defendants the amount of the said debt and interest, or any part thereof.

3d. And the defendants except to the ruling of the court on said trial, refusing the defendants' motion for a non-suit.

And the defendants except to each and every of the rulings and findings of said justice on said trial.

Dated December 22d, 1863.

Yours, &c.,

CHA'S N. BLACK,
Att'y for Def'ts.

To Messrs. BENEDICT, BURR & BENEDICT,
Att'ys for Pl'ffs.

24 Supreme court.

WALTER S. VOSE AND JAMES F. JOYCE
ag'st
JACOB H. V. COCKCROFT AND ARTHUR LEARY.

This cause coming on to be tried by the court, without a jury, and

counsel being heard for the respective parties, and the court having found for the plaintiffs herein, it is now, on motion of Benedict, Burr & Benedict, attorneys for the plaintiffs, ordered that Walter S. Vose and James F. Joyce, the plaintiffs, recover judgment against Jacob H. V. Cockcroft and Arthur Leary, defendants, for the sum of three hundred and six dollars and ninety-one cents, together with the sum of one hundred and sixty-nine dollars and eighty-three cents costs, amounting, in all, to the sum of four hundred and seventy-six dollars and eighty-three cents.

Supreme court.

WALTER S. VOSE AND JAMES F. JOYCE, respondents,
against
JACOB H. V. COCKCROFT AND ARTHUR LEARY, appellants.

GENTS: Please take notice that the defendants appeal from the judgment entered upon this action on the 12th day of December, 1863, in favor of the plaintiffs, and against the defendants, for the sum of $476 83, and from every part thereof, to the general term of this court.

Dated December 22d, 1863.

Yours, &c.,

CHA'S N. BLACK,
Att'y for App'l'ts.

To Messrs. BENEDICT, BURR & BENEDICT,
Att'ys for Resp'ts.
HENRY W. GENET Esq., *Clerk.*

25 New York supreme court.

WALTER S. VOSE ET AL.
vs.
JACOB H. V. COCKROFT ET AL.

At a general term of this court, held at the city hall, in city and county of New York, on the 27th day of November, 1865—

Present, Hon. D. P. Ingraham, W'm H. Leonard, Geo. G. Barnard—

This case being reached in its order on the calendar, and being argued by Mr. Benedict for the respondents, and Mr. Black for the appellants, it is hereby ordered that judgment, entered herein on the 12th day of December, 1863, in favor of the plaintiffs and against the defendant', for the sum of $476 83 be, and the same is hereby affirmed in all things, with costs.

(A copy.)

W'M C. CONNOR, *Clerk.*

26 New York supreme court.

WALTER S. VOSE AND JAMES F JOYCE
vs.
JACOB H. V. COCKROFT AND ARTHUR LEARY.

This cause having been argued before the general term of this court and the judgment herein having been affirmed, now, on motion of

Benedict, Burr & Benedict, attorneys for the plaintiffs, it is hereby ordered that the judgment entered herein on the 12th day of December, 1863, in favor of the plaintiffs, against the defendants, for the sum of four hundred and seventy-six dollars and $\frac{3}{100}$, be, and same is hereby, affirmed.

And it is further ordered that Walter S, Vose and James F. Joyce, plaintiffs, recover against Jacob H. V. Cockroft and Arthur Leary, defendants, for the sum of one hundred and twenty-six $\frac{21}{100}$ dollars, costs of the appeal herein.

(Endorsed:) Filed November 30th, 1865, at 10 o'clock and fifty-six minutes.

27 *Notice of appeal.*

Supreme court, first judicial district.

WALTER F. VOSE AND JAMES F. JOYCE, respondents,
against
JACOB H. V. COCKCROFT AND ARTHUR LEARY, appellants.

Take notice that the defendants hereby appeal from the judgment entered up in this action on the thirtieth day of November, 1865, in favor of the plaintiffs, and against the defendants, to the court of appeals.

Dated December 18, 1865.

Yours, &c.,

CHA'S N. BLACK,
Att'y for Appellants.

To Messrs. BENEDICT, BURR & BENEDICT,
Att'ys for Respondents.

W'M C. CONNOR, Esq.,
Clerk of the City and County of New York.

(Endorsed:) Filed Dec. 13, 1865.

STATE OF NEW YORK,
City and County of New York, ss:

I, William C. Connor, clerk of the supreme court of the said State, in and for the said city and county, do hereby certify that the pre-
28 ceding consists of certified copies of the judgment-roll and notice of appeal on file in my office.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 16th day of March, A. D. 1866.

[L. S.] W'M C. CONNOR, *Clerk.*

LEONARD, judge:

The contract between Lovejoy, the master, and Cockcroft, the owner, was not a chartering of the vessel, but was a mode of fixing the wages of the master. He was to take a share of the gross earnings, from which he was to bear certain expenses of running the vessel; and this share he was to receive "as wages." There is no time fixed for the continuance of the agreement. The owner could remove the master at any time without his consent, and it appears that he finally did so,

having the supplies furnished by the plaintiff, then on board, for which they never had been paid, and of which, it follows, the owner had the exclusive benefit.

The master ordered the supplies, and the plaintiffs furnished them on that order for the use of the vessel, and they were such as were proper. The knowledge of such a contract does not import an exclusive credit to the master, or any inconsistency with the present position of enforcing a lien for the supplies, so far as I can understand it.

The plaintiffs probably expected the master to pay for the supplies, but that does not indicate that they were not to look to their lien if he did not do so.

The judgment should be affirmed, with costs.

INGRAHAM, P. J.:

The agreement with the captain, made by the owner, being made only for the mode of compensation, did not release the vessel from the ordinary liability for supplies. If either had purchased, the lia-
29 bility would have been the same. There is nothing in the case to show that the plaintiffs knew of the existence of such a contract, and even if they had known of it the liability would continue, and more especially so when it appeared the stores were purchased, for a voyage not performed, and the defendants used the stores after they discharged the captain and put another in his place.

Even if the captain could be considered as a charterer, the vessel would be liable. In Pendleton vs. Franklin, (7 N. Y. Rep'ts., p. 538,) it was held that if the debt was contracted by the master, even where he had a charter for three years, the vessel was liable; and Gardner, J., says that the creditor is not bound at his peril to determine in which character he acted. A similar case was decided by this court in Kenzel vs. Kirk, 37 Barb., 113.

It is suggested that there is no finding on the question whether the plaintiffs knew the captain was sailing the vessel under this agreement; but no such finding is necessary, and if it were, we are to presume the court below so found, if necessary to sustain the judgment.

The judgment should be affirmed.

(SUTHERLAND, judge, (dissenting:)

The learned judge who tried this action at the circuit, found as a fact that at the time the plaintiffs furnished the provisions or stores, Lovejoy was sailing the vessel under the written agreement set out in the findings. By this agreement Lovejoy was to pay all bills for wages of officers and crew, and furnish provisions therefor. The judge also found that Lovejoy ordered the bill of stores from the plaintiffs, and understood from the plaintiffs that he was liable for them, but there is no finding whatever on the point or question, whether when the goods were ordered by Lovejoy, and furnished by the plaintiffs, the plaintiffs knew that Lovejoy was sailing the vessel under the written agreement. I think a finding on this point or question, one way or the other, was necessary for the determination of the question of law.
30 If there had been a definite finding that the stores or provisions were sold to Lovejoy, and on his credit, I do not think that finding alone would have determined the question of lien against the plaintiffs. In other words, I do not think the finding or conclusion that the plaintiffs had a lien on the vessel for their debt inconsistent with the fact, or finding of fact, that the stores were sold or furnished on the credit of Lovejoy; but I am inclined to think if the stores were sold on the

credit of Lovejoy, with a knowledge that he was sailing the vessel under the agremeent which bound him to furnish the ship's provisions out of his half of the gross amount of freight earned, that the plaintiffs must look to him alone for payment, and that they had no lien on the vessel for their debt. (See opinion of Judge Curtis, 6 Monthly Law Rep., New Series, p. 40.) I do not refer to this opinion as conclusive on the point, for the lien in the case before Judge Curtis was claimed under somewhat different circumstances; but still I think the views and reasonings of Judge Curtis in the case referred to, would in the main apply to this if the plaintiffs sold the goods on the credit of Lovejoy, knowing the terms of the agreement between him and the owner.

It does not look reasonable that the plaintiffs should have a lien on the vessel if the goods were furnished on the credit of Lovejoy, with a knowledge of the fact that he was under contract with the owner to furnish provisions out of his share of the earnings; and I do not think that the act under which the plaintiffs undertook to enforce their claimed lien, was intended to give a lien or to enable a party to enforce a lien under such circumstances. There is evidence in the case tending to show that the plaintiffs, when they furnished the stores, did know of the terms of the agreement between Lovejoy and the owner when they were furnished; but I do not think that it would be safe for the general term to find the fact of such knowledge in the absence of any finding by the court below from such evidence, and as the judge
31 who tried the cause has ceased to hold the office, and the case cannot be very well remitted for further findings, I think we should grant a new trial.

Costs to abide the event.

Judgment affirmed.

(New York general term, Sept. 19, 1865, Ingraham, Leonard, and Sutherland, justices.)

32 Supreme court.

WALTER S. VOSE & JAMES F. JOYCE
against
JACOB H. V. COCKROFT & ARTHUR LEARY.

At special term, June 6th 1871—present Hon. Geo. G. Barnard, justice.

On reading and filing remittitur from the court of appeals in this case affirming the judgment of the general term of this court with costs, now, on motion of Benedict, Burr & Benedict, plaintiffs' attorneys, it is ordered that the judgment of said court of appeals in this case be, and the same is hereby, made the judgment of this court, with costs to be taxed, and the clerk will enter judgment accordingly.

Enter.

(Signed) GEO. G. BARNARD.

33 Supreme court.

WALTER S. VOSE & JAMES F. JOYCE
against
JACOB H. V. COCKROFT & ARTHUR LEARY.

Judgment.—June 6th, 1871.

An appeal having been taken to the court of appeals by the defend-

ants from the judgment entered herein on the 30th day of Nov'r, 1865, for $126 61, and affirming a judgment entered in this action on the 12th day of December, 1863, for $476 83, in favor of the plaintiffs against the defendants, and the said appeal having been heard, and said court having decided and adjudged that the said judgment so appealed from be in all things affirmed, and that the plaintiffs recover their costs of appeal to said court, and the record & proceedings in said court having been remitted to this court there to be proceeded upon according to
34 law and the judgment of the court of appeals having been ordered to be made the judgment of this court: Now, on motion of Benedict, Burr & Benedict, attorneys for the plaintiffs, it is ordered that the said judgment so appealed from be, and the same is hereby, in all things affirmed, and that the plaintiffs, Walter S. Vose & James F. Joyce, recover of & from the defendants, Jacob H. V. Cockroft and Arthur Leary, the sum of two ($218 19) hundred & eighteen $\frac{19}{100}$ dollars, their costs and disbursements of appeal to the court of appeals, & judgment is hereby entered for the same.

(Endorsed:) "Filed June 6th, 1871, at 1 h. & 6 m."

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of New York, for the city & county of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between Walter S. Vose and James F. Joyce, plaintiffs, and Jacob H. V. Cockroft and Arthur Leary, defendants, a manifest error hath happened, to the great damage of the said Jacob H. V. Cockroft and Arthur Leary, as is said, and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and 70, and of the independence of the United States the ninety-fifth.

[L. S.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America,
for the Southern District of New York,
in the Second Circuit.

(Endorsed:)
"Allowed.

"L. B. WOODRUFF,
"*Circuit Judge.*

"Filed June 13, 1871."

36 *Bond for costs.*

Supreme Court of the United States.

JACOB H. V. COCKROFT AND ARTHUR LEARY, plaintiffs in error,
vs.
WALTER S. VOSE AND JAMES F. JOYCE, defend'ts in error.

Know all men by these presents, that we, Daniel D. Leary and George M. Rea, are held and firmly bound unto the above-named Walter S. Vose and James F. Joyce, in the sum of three thousand dollars, to be paid to the said Walter S. Vose and James F. Joyce; for the payment of which well and truly to be made, we bind ourselves and each of our *and each of our* heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the seventh day of June, in the year of our Lord, one thousand eight hundred and seventy-one.

Whereas, the above-named Jacob H. V. Cockroft and Arthur Leary, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judges of the court of appeals for the State of New York:

37 Now, therefore, the condition of this obligation is such, that if the above-named Jacob H. V. Cockroft and Arthur Leary shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

DANIEL D. LEARY. [SEAL.]
GEO. M. REA. [SEAL.]

Sealed & delivered, and taken & acknowledged this 9th day of June, 1871.

EDWIN J. COREY, J'R,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Daniel D. Leary and George M. Rea, each being duly sworn, doth depose and say, each for himself, that he is a resident of this State and a householder therein, and that he is worth the sum of six thousand dollars, over & above all his just debts and liabilities.

DANIEL D. LEARY.
GEO. M. REA.

Sworn to this 9th day of June, A. D. 1871, before me—
EDWIN F. COREY, JUN'R,
Notary Public, N. Y. Co.

(Endorsed:) "Approved as to form & sufficiency of sureties.
"L. B. WOODRUFF,
"*Circuit Judge.*"

(Endorsed:) "Filed this 13th day of June, 1871."

38 By the Honorable Lewis B. Woodruff, one of the judges of the circuit court of the United States, of the southern district of New York, in the second circuit, to Walter S. Vose James F. Joyce:

Whereas Jacob H. V. Cockroft and Arthur Leary have lately brought their writ of error in the Supreme Court of the United States, from a judgment rendered by the court of appeals of the State of New York, in favor of you, Walter S. Vose and James F. Joyce, against Jacob H. V. Cockroft and Arthur Leary, and have filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the ninth day of June, in the year of our Lord, one thousand eight hundred and seventy-
39 one, and of the independence of the United States the ninety-fifth.

L. B. WOODRUFF,
Circuit Judge, 2nd Circuit.

(Endorsed:) "We hereby admit service of a copy of the within citation, dated June 13, 1871." Benedict, Burr & Benedict. "Filed June 13, 1871."

40 Supreme Court of the United States. In error. Of December term, in the year of our Lord one thousand eight hundred and seventy-one.

JACOB H. V. COCKROFT
vs.
WALTER S. VOSE AND JAMES F. JOYCE.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Jacob H. V. Cockroft, by Cha's N. Black, his attorney, and says that, in the record and proceedings aforesaid there is manifest error in this, to wit: That the declaration aforesaid and the matters therein contained are not sufficient in law for the said Walter S. Vose and James F. Joyce to have or maintain their aforesaid action thereof against the said Jacob H. V. Cockroft. There is also error in this, to wit, that by
41 the record aforesaid it appears that the judgment aforesaid given was given for the said Walter S. Vose and James F. Joyce against the said Jacob H. V. Cockroft, whereas, by the law of the land, the said judgment ought to have been given for the said Jacob H. V. Cockroft against the said Walter S. Vose and James F. Joyce. And the said Jacob H. V. Cockroft prays the judgment aforesaid may be reversed, annulled, & altogether held for nothing; and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

CHA'S N. BLACK,
Attorney for Plaintiff in Error.

(Endorsed:) "Filed Octo. 31, 1871."

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of New York, for the city & county of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between Walter S. Vose and James F. Joyce, plaintiffs, and Jacob H. V. Cockcroft and Arthur Leary, defendants, a manifest error hath happened, to the great damage of the said Jacob H. V. Cockcroft and Arthur Leary, as is said, and as appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and 70, and of the independence of the United States the ninety-fifth.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

43 (Indorsed:) Supreme Court. Walter S. Vose & James F. Joyce, defendants in error, ad. Jacob H. V. Cockcroft & Arthur Leary, plaintiffs in error. Writ of error. Cha's N. Black, att'y for pl'ffs in error.

Allowed.

L. B. WOODRUFF, *Circ't Judge.*

Filed June 13, 1871.

44 The answer of the justices of the supreme court of the State of New York for the first judicial department, in the within writ mentioned.

The record and proceedings whereof mention is within made, with all things touching or in anywise concerning the same, are respectfully certified to the judges of the Supreme Court of the United States, as within we are commanded.

In witness whereof I, Charles E. Loew, clerk of the s'd supreme court of the State of New York, first judicial department, have hereunto subscribed my name and affixed the seal of said court this seventh day of November, one thousand eight hundred and seventy-one.

[SEAL.] CHA'S E. LOEW, *Clerk.*

(Indorsement on cover:) No. 571. Jacob H. V. Cockcroft and Arthur Leary, plaintiffs in error, vs. Walter S. Vose & James F. Joyce. New York sup. court. Filed 28th December, 1871.



Supreme Court of the United States.

DECEMBER TERM, 1871. NO. 571.

COCKCROFT & LEARY
vs.
VOSE & JOYCE.

On Motion to Dismiss.

BRIEF CONTRA.

The record shows that the proceeding was instituted in the Supreme Court of New York upon a statutory bond given by the plaintiffs in error to release the brig Jachin, which had been seized or attached at the suit of the present defendants in error to enforce a lien for supplies furnished upon the order of the master, such lien being given by a statute of the State of New York, to wit, art. 8, chap. 8, part 3, of the Revised Code of said State. (Rec. p. 2. Reviser's 3d ed., vol. 2, p. 589.) The bond is set forth in the record, (p. 3,) and its character as an admiralty release bond clearly appears. In the bond it is recited that the brig had been attached by the present defendants in error, claiming a lien thereon under the above-mentioned statute, and the condition is that the obligors shall pay "all subsisting liens upon such vessel, pursuant to the provision of the title above-mentioned," &c., &c.

The answer denies "that said claim was a subsisting lien upon said vessel." Rec., p. 4.

The judgment, to reverse which this writ of error was sued out, affirmed the validity of the lien as created by the State statute.

Such lien was in its nature a maritime lien, and the proceedings to enforce it were proceedings *in rem*, which the same State statue purported to authorize.

This was essentially a case of admiralty and maritime jurisdiction, and was within the exclusive cognizance of the district court of the United States. *Brookman* vs. *Hamil*, 44 N. Y. Rep., 554; *The Belfast*, 7. Wall.

The judgment below could only have been rendered upon the ground that such jurisdiction was not exclusively in the federal court, and the question whether it was so or not plainly arises upon the record, and is within the provisions of the 25th section of the judiciary act of 1789.

In such case it is not essential to the jurisdiction of this court that it it should appear affirmatively on the record that there was a plea to the jurisdiction, or a special exception to same effect. It is sufficient that the record shows that the question was necessarily involved, and that the judgment necessarily decided the point, and denied the privilege or exemption under the Constitution and the 9th section of the act of 1789.

That this question was actually discussed in the Court of Appeals, and was passed upon by that court, appears by the report of the case in 43 N. Y Reports, p. 415.

The whole subject of the exclusive jurisdiction of the Federal courts in cases of admiralty and maritime jurisdiction, is carefully reviewed in the opinion of the court, [by Mr. Justice Clifford,] in the case of the Belfast, 7 Wall.

And the case is not the less one of admiralty jurisdiction if the remedy, as where the supplies are furnished to a

domestic ship, is confined to process *in personam*. (Rules in admiralty, No. 12.)

The record does not show whether the Jachin was a foreign or domestic vessel, nor is that fact material in this case.

J. M. CARLISLE,
C. N. BLACK,
Of Counsel for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

JACOB H. V. COCKCROFT and ARTHUR LEARY, *Plaintiffs in Error, agst.* WALTER VOSE and JAMES F. JOYCE, *Defendants in Error.*	*Brief and Points for Defendants in Error, on the motion to dismiss writ of Error.*

STATEMENT.

This is a motion to dismiss a Writ of Error, whereby the plaintiffs in error seek to review a judgment of the Supreme Court of the State of New York. The action was brought in the Supreme Court of the State of New York upon a bond signed by the defendants whereby they agreed to pay to the plaintiffs "The amount of all such claims and demands as have been exhibited, which shall be established to have been subsisting

liens" upon the brig "Jachin" "pursuant to the provisions of the Revised Statutes of the State of New York, at the time of exhibiting the same, respectively." The complaint alleged That the master of the vessel had contracted a debt within the State for supplies furnished to said vessel on the 9th of March, 1859, that an attachment had been issued against her pursuant to the provisions of the Revised Statutes of the State of New York, under which she had been seized by the Sheriff, whereupon the bond in question was given. (Record p. 2 and 3).

The answer of the defendants in the case did not raise any objection of the unconstitutionality of the said Revised Statutes. The substantial defence under the answer was that the supplies furnished by the plaintiff were not furnished on the credit of the vessel, but were furnished on the sole credit and responsibility of the master. (See Record, p. 4).

The case was tried upon that issue, before a judge without a jury, and the Court found in favor of the plaintiffs. Judgment was entered in their favor. From this judgment the defendants appealed to the General Term, (Record, p. 13), by which the judgment was affirmed. The opinions of the judges composing the General Term are to be found on pages 14, 15, and 16 of the Record. From this judgment of the General Term an appeal was taken to the Court of Appeals, which af-

firmed the judgment, and on the remittitur from the Court of Appeals final judgment was entered in the Supreme Court in favor of the defendants in in error against the plaintiffs in error, and that judgment is brought before this Court by the writ of error.

The defendants in error now move to dismiss the writ of error, for lack of jurisdiction in this Court to entertain the case.

FIRST POINT.

This Court has held by a long series of authorities, that where it is sought to review by writ of error the judgment of a Court of a State, it must appear *from the Record itself* that a question was raised in the State Court as to the repugnancy of some State statute to the constitution or laws of the United States, and that the State Court upon such question adjudged the statute valid.

Crowell *vs.* Randall, 10 Peters. 392.
Commercial Bank *vs.* Buckingham, 5 How. 341.
Williams *vs.* Oliver, 12 How. 111, 124.
Lawler *vs.* Walker, 14 How. 511.
Maxwell *vs.* Newbold, 18 How. 252.
Hoyt *vs.* Sheldon, 1 Black 518.
Rector *vs.* Ashley, 6 Wall, 142.
Parmalee *vs.* Lawrence, 11 Wall, 36.

In the last case above cited the Court say, "The conflict of the State law with the constitution of the United States, and a decision by a State Court in favor of its validity must appear *on the face of the record*, before it can be reëxamined in this Court; it must appear *in the pleadings of the suit*, or from the *evidence* in the course of the trial, in the *instructions* asked for, or from *exceptions* taken to the rulings of the Court. It must be that such a question was necessarily involved in the decision and that the State Court could not have given a judgment without deciding it."

Mr. Phillips in his book of practice suggests a doubt, founded on the language of the Court in the case of Stewart against Kahn, (11th Wallace, p. 493), whether, since the passage of the Act of February 5th, 1867, the Court will not look elsewhere than to the record to find whether there is ground of error; but inasmuch as the Court has, in several cases since the Act of 1867, reiterated the doctrine previously held, that the error must appear on the face of the record, prominent among which cases is the case of Parmelee *against* Lawrence, above cited, we suppose that the Court in considering this motion will look only to the record.

SECOND POINT.

There is nothing in the record which shows that the question of the constitutionality of any provisions of the Revised Statutes was made or passed upon by the Supreme Court of the State. The pleadings show that no such question was raised; no such question is suggested by the evidence or the exceptions. The opinions of the Judges at the General Term show that no such question was raised before them or passed upon by them, nor does any such question appear in the remittitur from the Court of Appeals, or the judgment of the Supreme Court entered thereon.

THIRD POINT.

If it be suggested that it may be inferred that the question of the invalidity of the Statutes was drawn in question by the exception to the finding that the debt was a subsisting lien upon the brig "Jachin," we answer that it is entirely obvious that there is no *necessary* inference, from that exception, that any question of the invalidity of the Statutes was raised, and, as says Judge Taney in Maxwell *vs.* Newbold, "It must appear on the

face of the record that the question of the unconstitutionality of the Statute was *in fact raised*, that the judicial mind of the Court was exercised upon it and their decision was in favor of the validity of the Statute." There is no necessary inference of this kind from the exception. On the contrary it appeared that the party had waived all objections to the validity of the proceedings; that a bond had been given by which the party bound himself to pay all such claims as should be found to be subsisting liens, pursuant to the provisions of the Statute, and that the only objection raised was that this claim was not a subsisting lien pursuant to the provisions of the Statute—not that the Statute was invalid.

FOURTH POINT.

If, however, this Court should determine to look beyond the printed record, and should examine the published opinions given by the Court of Appeals in deciding the case, they will find the fact to be that the question of the constitutionality of the Statute, although it was not raised in the Supreme Court, or in the General Term on appeal, was dis-

cussed for the first time in the Court of Appeals, and that the case so far is on all fours with the case of Parmalee *against* Lawrence, above cited. But they will also find that so far from the decision of the Court of Appeals being in favor of the validity of the State Statute, the opinion is expressed that the Statute was invalid, as being against the provisions of the Constitution of the United States.

This being so, it is evident that the question which is proposed to be raised in this Court by this writ of error is not the question of the constitutionality or unconstitutionality of a State Statute, but only the question of practice whether a defendant who has not availed himself of a defence which he had, by pleading, or evidence, or in any way, until his case was brought before the final Court of Appeal, can then be allowed to raise the question. Or in other words, whether it is the province of the Court of Appeals of the State of New York to decide questions on appeal which have never been submitted to the inferior Courts. We submit that neither of those questions is allowed by the Judiciary Act to be brought before this Court for re-examination by writ of error.

FIFTH POINT.

The motion, therefore, should be granted and the case dismissed.

BENEDICT & BENEDICT,

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R. D. BENEDICT, *of Counsel.*

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

Jacob H. V. Cockcroft and Arthur Leary,
Plaintiffs in Error,

vs.

Walter S. Vose and James F. Joyce,
Defendants in Error.

Points for the Plaintiffs in Error on the Motion to Dismiss the Writ of Error taken in this Cause.

I.—The record shows, on its face, that this suit was brought, in the Supreme Court of the State of New York, by the defendants in error, to enforce an alleged lien for supplies furnished the brig *Jachin* in the port of New York.

That prior to the commencement of said suit, a warrant of attachment was issued by one of the

Justices of said Court, pursuant to the provisions of Article 8th, Chapter 8th, Part 3d of the Revised Statutes, entitled "An Act to provide for the collection of demands against ships and vessels," directed to the Sheriff of the city and county of New York to seize said vessel for the purpose of enforcing said alleged lien. That the Sheriff did thereupon seize said vessel as directed.

That for the purpose of discharging said vessel from the custody of the Sheriff, and in pursuance of said statute, the plaintiffs in error gave their bond to the defendants in error, whereby they became bound to pay to the said defendants in error the amount of all such claims and demands "as shall have been exhibited, which shall be established to have been subsisting liens" upon said vessel pursuant to the statute above mentioned; and that afterwards this suit was brought by the defendants in error to enforce the bond (fols. 6–9).

The cause was tried on the 6th day of November, 1863, and judgment given for the defendants in error (fols. 11, 24); and said judgment was affirmed on appeal to the General Term of said Court (fol. 26). An appeal was taken by the plaintiffs in error from this judgment to the Court of Appeals (fol. 27); and on the 19th day of May, 1871, said Court of Appeals rendered final judgment in said cause, affirming said judgment of the Supreme Court (fol. 2); and said cause was remitted to the Supreme Court, and judgment given by said Court in favor of the defendants in error and against the plaintiffs in error on the 6th day of June, 1871 (fol. 33), whereupon this writ of error was duly brought by the said plaintiffs in error to correct the error in the rendition of said judgment given *in the said Court of Appeals.*

II.—This action is brought upon a bond, and the facts appearing *on the face of the record* show that the bond was void, taken by a public officer in a void proceeding, and void because taken under a State statute which infringes upon the exclusive jurisdiction of the Federal Courts.

The *Moses Taylor* (4 Wall, 411).
The *Hine* (4 Wall, 555).
The *Josephine* (39 N. Y., 19).
Brookman *vs.* Hamill (43 N. Y., 554).

III.—The record not only shows upon its face that the State law was drawn in question as in conflict with the Constitution and Laws of the United States, and that the question was necessarily involved in the decision, so that the State Court could not have given judgment without deciding it, but it also shows that the decision of the Court was in favor of the State law.

IV.—It is true that the validity of the State law was not discussed in the Supreme Court, and that the Supreme Court decided the case on other grounds; but this writ of error is not brought to correct any error in the rendition of the judgment of that Court. It is brought to correct the error in the rendition of the judgment in the Court of Appeals.

The action of the Supreme Court, however, was based upon the assumption that the State law was valid, as the foundation of the action rested upon the validity of that law.

V.—It is conceded by the defendants in error that the constitutionality of the State statute was discussed in the Court of Appeals. In that Court the main question was as to the validity of this act, but it was said by the Court, the plaintiffs in error had waived that defence by not pleading it, and insisting upon it on the trial of the cause.

Vose & Joyce *vs.* Cockcroft & Leary, 44 N. Y., 415.

VI.—Assuming the law tolerates such a thing as a waiver of this character, this waiver does not appear upon the face of the record. So far as the record shows, and that is all we have to consider upon this motion, it appears that a State statute was drawn in question as in conflict with the Constitution and Laws of the United States, and that the decision of the Court was in favor of the State law.

VII.—The plaintiffs in error contend that they did not and could not waive the constitutionality of this law. That if the Court held the law to be unconstitutional, it was bound to give the plaintiffs in error the benefit of it. That the Court had no right to exercise any authority under it. An unconstitutional law is no law, and a party cannot waive or be affected by that which never existed.

The case of Brookman *vs.* Hamill is similar to this. In that case the constitutionality of the State law was not raised in the Supreme Court, but the Court of Appeals held the bond was void.

That case has the advantage of being later than

this, and decided by the Court of Appeals proper, while this was decided by the Court of Appeals Commission.

VIII.—It is enough to say that the face of this record shows that the Court sustained the validity of this State statute, no matter what reasons the Judges may have assigned in their opinions.

For the purposes of this case, the validity of the statute is sustained, and if this judgment is enforced, the plaintiffs in error will be compelled to pay a judgment founded upon a State statute which is unconstitutional and void, and in point of fact the same as if it did not exist. The case stands the same, and the plaintiffs in error are entitled to their writ of error the same as if the State Court had assigned no reason for its decision.

If it does not, although the face of the record may show the plaintiffs in error are entitled to their writ, yet any erroneous reasoning in the opinions given in the State Court might defeat the writ.

The jurisdiction of the Supreme Court cannot be affected by any such action of the State Court. When the whole question is before it by the record, will this Court look to anything but the decision simply for or against? On any other principle, State Courts, at their option, may oust the Supreme Court of its jurisdiction in this class of writs.

The Court, while admitting the invalidity of the statute, gives it validity, existence and effect. An apparently paradoxical condition of things, that

can only be relieved from inconsistency by holding that the State Court decided in favor of the validity of the statute, irrespective of, or in spite of, its *obiter dictum* opinion, or in spite of an opinion then rendered by it, that can be treated only as *obiter dictum* under the circumstances.

J. M. CARLISLE and
CHARLES N. BLACK,
Of Counsel for Plaintiffs in error.